[18,437.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAY 7 1903
JAMES H. McKENNEY,
Clerk.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

vs.

JAMES S. PHELPS and FIDELITY TRUST & SAFETY VAULT COMPANY,
Appellees.

No. 263.

MEMORANDUM IN ANSWER TO APPELLEES' SUPPLEMENTAL PRINTED STATEMENT.

Since the argument, counsel for appellees has submitted a memorandum calling the attention of the court to the case of *Youngstown Bridge Co.* v. *White's Adm'r*, 105 Ky. 273, 283. The case is cited to sustain the proposition that an appeal in the case at bar would not have constituted the equivalent of a general appearance. It is argued that, inasmuch as the Court of Appeals of Kentucky in that case did not, in remanding the case after holding the service of process insufficient to support the judgment, state that the defendant was in court as under a general appearance by reason of the appeal, in accordance with the rule applied in *Chesapeake, etc., R. Co.* v. *Heath's Adm'r*, 87 Ky. 651, 660, the doctrine of the latter case would not have been applicable to the case at bar had the Association appealed from the judgment of the state court and secured a reversal in the appellate court.

There is nothing in the *Youngstown Bridge* case to furnish any basis for such a contention. The point in that case arose upon a proceeding by motion, after judgment by default and at a subsequent term, to set aside the judgment for insufficient service of process and to

quash the return. In the nature of the case, therefore, the appellate court could not remand the case for a new trial; but, upon holding the service insufficient, there was no course open other than that taken, namely, to hold that the motion should have been granted and remand "with directions to set aside the judgment and quash the return." A new trial could not have been awarded in such a proceeding. In the case in the state court now before this court, however, as in the case of *Heath's Adm'r*, an appeal by the Association with success could only have resulted in a new trial. Of course, had the Association not appeared specially at the trial, but subsequently and after final judgment had proceeded by motion to set aside the judgment, a new trial could not have been awarded, and the rule applied in the case of *Heath's Adm'r* would have been inapplicable. That course would have involved such delay as to have rendered any relief when obtained unavailing, since a stay of proceedings on the judgment pending the litigation is in such case expressly forbidden by statute (*Jacobson* v. *Wernert*, 19 Ky. L. R. 662–663).

In *Chesapeake, etc., Ry. Co.* v. *Wilder* (Ky., March 4, 1903), 72 S. W. Rep. 351, the Kentucky rule that an appeal constitutes an entry of general appearance for all the purposes of a new trial after remand, notwithstanding a reversal solely because of insufficient service of process, is again unmistakably reiterated. In delivering the opinion of the court, Hobson, J., said (p. 353):

> "The Louisville & Nashville Railroad Company, although it may have acted as the agent of the defendant in making the contract, is not such an agent as the statute contemplates; and therefore the service of process upon it was invalid, and should have been quashed. But on the re-

turn of the case to the circuit court no further process will be necessary, *as the appeal enters the defendant's appearance to the action.* In 3 Cyc. 510, the rule on this subject is thus stated: 'Taking an appeal or suing out a writ of error from an inferior court to an intermediate appellate court, which tries the same *de novo*, constitutes a general appearance in the intermediate court, and confers jurisdiction of the person on that court, whether the court from which the appeal was taken had acquired jurisdiction of the person or not. If the appeal is to a reviewing court, it is a general appearance, in the sense that on reversal and remand to the trial court the defendant is in court for the purpose of further proceedings without any further steps to bring him into court, even though the judgment was reversed on the ground that the trial court had not acquired jurisdiction of the person of the defendant.' This rule was laid down in 1809 by this court in *Grace* v. *Taylor*, 4 Ky. 430. It was followed in 1815 in *Graves* v. *Hughes*, 7 Ky. 84, and *Wharton* v. *Clay*, 7 Ky. 167; also in 1826 in *Hockaday, etc.*, v. *Commonwealth and Adkins*, 20 Ky. 12. In a number of subsequent cases the rule is adhered to. *Bradford* v. *Gillaspie*, 38 Ky. 67; *Chesapeake, Ohio & Southwest R. R. Co.* v. *Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832; *Thompson* v. *Moore*, 15 S. W. 6, 358; *Lillard* v. *Brannin*, 91 Ky. 511, 16 S. W. 349."

Upon the point that the "amended and supplemental petition" of Phelps in the state court was the institution of a new suit requiring new process, see also, the recent decision in *Hudson* v. *Wood*, 119 Fed. Rep. 764, 772–775, where the present case is discussed.

New York, May 4, 1903.

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